[2014] AATA 871

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2013/5726 |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Senior Member Bernard J McCabe** |
| Date | **13 November 2014** |
| Date of written reasons | **24 November 2014** |
| Place | **Sydney** |

The decision under review is affirmed.

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**Senior Member Bernard J McCabe**

# Catchwords

SOCIAL SECURITY – pensions – disability support pension – whether conditions are fully diagnosed, stabilised and treated – whether applicant’s impairments are rated 20 or more points under the impairment tables – decision affirmed

# Legislation

Social Security Act 1991 s 94

# Secondary Materials

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011

# REASONS FOR DECISION

**Senior Member Bernard J McCabe**

**24 November 2014**

1. A decision in these proceedings was delivered orally together with reasons at the conclusion of the hearing. The applicant subsequently requested written reasons be supplied. These written reasons were distilled from the transcript of the hearing.
2. The applicant made an application for disability support pension on 24 May 2013. I must decide whether the applicant qualified for the disability support pension in the 13 weeks that follow. To this end, I must look to the so called “medical criteria” for disability support pension which are set out in s 94 of the *Social Security Act 1991*.
3. The applicant is currently suffering from (and suffered from at the relevant time) a number of different conditions, in particular a spinal condition to the upper and lower spine. The applicant also suffered from a lower limb condition affecting his knees and ankles. There was a reference to a brain tissue injury but there was little evidence in relation to that. He was also suffering from a wrist condition. There was also evidence that subsequently the applicant developed a shoulder condition. The applicant clearly satisfies the requirement that he has an impairment: s 94(1)(a).
4. The second criterion requires the assignment of impairment ratings in respect of those conditions. In the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011*, there is a separate impairment table for each type of condition discussed in this case. There is an impairment table for the spine, both upper and lower, an impairment table for the lower limb condition (which includes knees and ankles) and there is an impairment table for upper limbs.
5. The Secretary conceded the spinal condition can be assigned 10 points. There is a *possibility* hinted at in the evidence that the spinal condition could be assigned 20 impairment points. Unfortunately the available evidence does not clearly sustain that finding in relation to the period under review. It is difficult at this point to go back and get evidence that would clarify that position – whereas it should be possible to obtain evidence now that would demonstrate the level of functional impairment that Mr Piazza experiences at the moment. Currently, it appears the applicant’s impairment from the spinal condition may be closer to 20 than to 10 points but the medical evidence relating to the relevant period is insufficient to reach that view.
6. The Social Security Appeals Tribunal assigned 5 impairment points for Mr Piazza’s lower limb condition involving the knees and ankles. The Secretary submitted that the assignment rating should be nought but I am satisfied it is 5 points after hearing the applicant’s evidence and looking at the job capacity assessor’s report.
7. Mr Piazza’s shoulder condition was not really an issue at the time of the original application. It has become a problem since. It cannot be included in the discussion of his conditions for present purposes. I accept his wrist has been a problem for a long time. Unfortunately, the evidence we have in relation to that condition during the assessment period from Dr Strokon suggests there was an expectation of improvement from treatment that was being undertaken at the time. (He was referring to some steroid injections.) I do not think an impairment rating could be assigned because the condition had not *at that point* been fully treated and stabilised.
8. That means the applicant’s impairment rating is 15 points rather than the 20 points he needs to be eligible for the pension at the relevant time. However, Mr Piazza indicated in his evidence that his conditions were getting progressively worse and he was becoming even more debilitated. I accept that has been happening over a long period of time and it is probably going to keep happening. It is also possible that if the applicant can get his doctors to focus on the impairment tables and actually respond to the criteria rather than making general assertions such as “He just can’t work” he would be able to satisfy the eligibility criteria in the course of a fresh application. Mr Piazza might also do much better on a fresh claim given there are other conditions (for example, the shoulder) that might now be relevant. Those conditions, together with the evidence about the current state of his spinal condition, may well attract in excess of 20 points.
9. In conclusion, during the relevant period, I am satisfied the two conditions that were fully diagnosed, treated and stabilised were the spinal condition and the lower limb condition. The spinal condition should be assigned 10 points and the lower limb condition 5 points. There is a possibility that the applicant’s spinal condition could be assigned 20 points if there were more evidence available, but that evidence is unlikely to be forthcoming given the passage of time and the difficulty of retrospective analysis. As for the upper limb condition, the shoulder might well be something that could be taken into account now because it has arisen subsequent to the earlier application. The wrist condition was present at the time and was being treated but I don’t accept it was necessarily fully treated and stabilised at that point.
10. As Mr Piazza did not have 20 impairment points, I do not need to consider the third criterion in s 94, which refers to an inability to work. The decision under review is affirmed.

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| I certify that the preceding 10 (ten) paragraphs are a true copy of the reasons for the decision herein of Senior Member Bernard J McCabe |

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Associate

Dated 24 November 2014

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| Date of hearing | **13 November 2014** |
| Applicant | **In person** |
| Solicitors for the Respondent | **Mr D McLaren, Department of Human Services** |